No. 465

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

J. S. WOODS,
Petitioner,

vs.

INTERSTATE REALTY COMPANY,
Respondent.

BRIEF OF RESPONDENT ON APPLICATION OF PETITIONER FOR WRIT OF CERTIORARI

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INDEX

SUBJECT INDEX

		PAGE
Foreword		1
Summary of Argument		2
Argument		4
I.	The Contract Violates No Statute or Public Policy	4
II.	Section 5344, Miss. Code of 1942, Analyzed	5
III.	The Statute as to License Fees Upon Real Estate Agents	6
IV.	These Penalties are Limited to Those Specifically Set Forth in the Mississippi Statutes	6
V.	The Supreme Court of Mississippi Does Not Say That Such Contracts are Void	7
VI.	Discussion of Non-Applicability of Guaranty Trust Co. v. York and Angel v. Bullington	7
VII.	Contracts Like the One in Suit are Not Void Nor Against Public Policy in Mississippi	9
VIII.	Additional Cases Showing That the Supreme Court of Mississippi Does Not Consider Such Contracts Void	11
IX.	Further Analysis of State and Federal Decisions	13
X.	Further Analysis of Other State Decisions	15
Conclusion		18

INDEX
TABLE OF CASES CITED

	PAGE
Amer. Juris., Vol. 12, p. 668, Sec. 171, note 7	3, 7
Angel v. Bullington, 330 U. S. 183, 91 L. Ed. 832	3, 7, 8, 14
Bohn v. Lowry, 77 Miss. 424, 27 So. 604	16
Brace v. Gauger-Korsmo Construction Co., 36 F. (2d) 661, Cert. den. 281 U. S. 738, 50 S. Ct. 333, 74 L. Ed. 1153	14, 15
Case v. Mills Novelty Co., 187 Miss. 673, 193 So. 625	18
C. B. & Q. Ry. Co. v. Maguire, 219 U. S. 549, 55 L. Ed. 328, 31 S. Ct. 259	3, 4, 7, 10
Citizens Bank of Hattiesburg v. Grigsby, 170 Miss. 655, 155 So. 684	12
Erie Railroad Co. v. Tompkins, 304 U. S. 64, 82 L. Ed. 1188, 114 A.L.R. 1487	8, 14
Grapico Bottling Co. v. Ennis, 140 Miss. 502, 106 So. 97	17
Guaranty Trust Company v. York, 326 U. S. 99, 89 L. Ed. 2079, 160 A.L.R. 1231	3, 7, 8
Interstate Realty Co. v. Woods, 168 F. (2d) 701	2, 11
Long Beach Canning Co. v. Clark, 141 Miss. 177, 106 So. 646	12
Marx & Bensdorf v. First Joint Stock Land Bank, 178 Miss. 345, 173 So. 297	17
May v. Mulligan, 36 F. Supp. 596, aff. 117 F. (2d) 259, Cert. den. 312 U. S. 691, 85 L. Ed. 1127	3, 11

INDEX

TABLE OF CASES CITED—(Continued)

	PAGE
Newell Contracting Co. v. State Highway Commission, 195 Miss. 395, 15 So. (2d) 700	15
Quartette Music Co. v. Haygood, 108 Miss. 755, 67 So. 211	3, 4, 10, 16
Stamps v. Frost et al, 174 Miss. 325, 164 So. 584	17

STATUTES CITED

Mississippi Code of 1942	
Section 5319	2, 3, 4, 5, 9, 10, 13, 16, 18
Section 5339	2, 9, 10
Section 5343	2, 9, 10, 18
Section 5344	2, 5, 9, 10
Mississippi Laws of 1944	
Section 155, Chapter 137	6
Section 224, Chapter 137	6
Mississippi Code of 1930	
Section 4140	17
Section 4164	18
Mississippi Code of 1906	
Section 915	10
Section 935	10
Section 914	10

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To the honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

FOREWORD

This brief is in answer to the petition filed in this cause for writ of certiorari.

Petitioner has already referred the Court to the official report of the opinion below. He has set forth the jurisdictional grounds upon which he bases his assertion of right to the writ prayed for. We have no quarrel with these if the premises upon which he predicates his petition are sound, but we say they are not.

SUMMARY OF ARGUMENT.

I.

The contract violates no statute or public policy of the State of Mississippi. The statutes relied upon by petitioner do not forbid the making or performance of contracts like the one which is the basis of this suit. They provide penalties as to foreign corporations which do not comply with certain requirements as to domestication. The public policy of the State is no broader than the intendment of the statutes and they only provide exclusion from the State courts, together with certain fines, as such penalties.

Miss. Code of 1942, Sections 5319, 5339, 5343 and 5344.

Miss. Laws of 1944, Chap. 137, Sections 155 and 224.

II.

The decisions with respect to these statutes from the Supreme Court of Mississippi are conflicting but, as the United States Court of Appeals for the Fifth Circuit has found, the Supreme Court of Mississippi does not consider contracts made by non-complying foreign corporations to be void but only unenforceable in the state courts.

Interstate Realty Co. v. Woods, C.C.A. 5, 168 F. (2d) 701.

III.

There is nothing in the decisions of the Supreme Court of the United States which would indicate that it has decided to include cases arising under State penal statutes among those falling under the doctrine of Erie v. Tompkins. As to such cases, it cannot be said that the Federal district courts must give effect to such State penal stat-

utes the same as the State courts of the same jurisdiction would be required to do.

Guaranty Trust Co. v. York, 326 U.S. 99, 89 L. Ed. 2079, 160 A.L.R. 1231.
Angel v. Bullington, 330 U.S. 183, 91 L. Ed. 832.

IV.

Petitioner is confusing two familiar principles of law. One is that a contract whose subject matter is in violation of the law or public policy of a state is void and will not be enforced in any court. The other is that under certain penal statutes of the states, the contracts of parties who have failed to comply with certain statutory requirements set up by the State will not be enforced in the courts of the State when the statutes so direct. This contract falls within the second category, and its non-enforceability extends only to the courts of Mississippi. In the latter situation, the public policy of the State only requires that such plaintiffs be excluded from the State courts.

12 Amer. Juris. 668, Sec. 171, note 7.
C. B. & Q. Ry. Co. v. Maguire, 219 U.S. 549, 55 L. Ed. 328, 31 S. Ct. 259.
Compare May v. Mulligan, 36 F. Supp. 596, aff. 117 F. (2d) 259, Cert. Den. 312 U.S. 691, 85 L. Ed. 1127.

V.

The enactment of Section 5319 of the Mississippi Code of 1942, coming fourteen years after the decision in Quartette Music Company v. Haygood, 108 Miss. 755, 67 So. 211, clearly shows that the legislature of the State of Mississippi did not intend that either the law or the public policy of the State of Mississippi should make contracts of non-complying foreign corporations void, but

only that they should be unenforceable in the courts of Mississippi.

Quartette Music Company v. Haygood, supra.
Miss. Code of 1942, Section 5319.
C. B. & Q. Ry. Co. v. Maguire, supra.

VI.

Counsel for petitioner have assumed, rather than established, the position that the contract in suit is against the laws and public policy of Mississippi. Since their assumption is wrong, the entire premise upon which their position is predicated falls.

VII.

The case is one in which certiorari should not be granted.

ARGUMENT.

I.

The Contract Violates No Statute or Public Policy.

Petitioner seems to base his application for certiorari chiefly upon the contention that the Federal District Court could not entertain respondent's suit because it arises out of a contract which violates the statutes and public policy of the State. (Petitioner's Reason I.) If petitioner be wrong as to this basic premise, it seems obvious that he is not entitled to the writ. It is our position that the contract itself violates no statute of the State of Mississippi. It is our further position that the contract does not violate the public policy of the State of Mississippi because the public policy of the State, as reflected in its statutes, extends no further than the fair intendment of the statutes themselves. Such violation of

the laws of Mississippi as may exist here has nothing to do with the contract itself but only with the failure of respondent to qualify as a foreign corporation before making the contract. The statutes involved in this matter are penal in their nature. They provide that under these circumstances such a foreign corporation "shall not be permitted to bring or maintain any action or suit in any of the courts of this State". (Section 5319, Mississippi Code of 1942). The restrictions of this language of the statute itself must be deemed to be incorporated into the public policy of the State. Additional penalties are provided in the form of fines, further corroborating our contention that the statutes in question are essentially penal in their nature.

II.

Section 5344, Miss. Code of 1942, Analyzed.

When analyzed, Section 5344, Mississippi Code of 1942 falls within the purview of the observations made above. That is to say, that Section provides that foreign corporations "shall not be allowed to recover on any contract made in violation of law or public policy". The contract here was not one in violation of any law or of the public policy of the State of Mississippi. There is nothing violative of the laws or public policy of Mississippi about a contract to sell real estate for another. Moreover, this section seems clearly intended to apply to foreign corporations which have qualified and is only intended to provide that after qualifying they, like domestic corporations, must observe the laws and public policy of the State of Mississippi. It does not deal with the admission of foreign corporations and obviously does not contemplate failure to qualify as being any part of a "contract made in violation of law or public policy".

III.

The Statute As To License Fees Upon Real Estate Agents.

The same observations as we have made under Section I above are applicable to Section 155, Chapter 137, Mississippi Laws of 1944. This provides for certain license fees upon real estate agents and brokers. The only penalty provided for the violation of this act consists of a fine or imprisonment or both. (Section 224, Chapter 137, Mississippi Laws of 1944).

IV.

These Penalties Are Limited to Those Specifically Set Forth in the Mississippi Statutes.

Since the public policy of Mississippi extends no further than the fair intendment of these statutes and since they provide for exclusion of such foreign corporations from the State courts and, in addition, certain fines as the only penalties for non-compliance, the conclusion seems clear that the public policy of the State is satisfied when these penalties are inflicted upon violators and that the public policy of the State does not contemplate any more drastic penalization than that provided by the statutes themselves. That is to say, exclusion from the State courts is the maximum—and only—penalty of the kind provided or intended. Any other interpretation, such as extending the barrier to suing so as to include suits in the Federal courts, would result in inflicting additional penalties upon violators which were not contemplated or provided by the Legislature of Mississippi.

> "Where the law-making power speaks on a particular subject over which it has constitutional power

to legislate, public policy in such a case *is what the statute enacts.*" (Italics ours.)

12 Amer. Juris. 668, Sec. 171, note 7.

C. B. & Q. Ry. Co. v. Maguire, 219 U.S. 549, 55 L. Ed. 328, 31 S. Ct. 259.

V.

The Supreme Court of Mississippi Does Not Say That Such Contracts Are Void.

The most that can be said on petitioner's behalf with respect to the adjudicated cases in Mississippi is that they are in confusion. On behalf of the respondent, we think it can fairly be added that out of the confusion there emerges sufficient light to indicate that the highest court in the State does not consider such contracts to be void but only unenforceable in the State courts.

VI.

Discussion of Non-Applicability of Guaranty Trust Co. v. York and Angel v. Bullington.

Petitioner gives as his second reason why the writ of certiorari should be granted, that the Court of Appeals for the Fifth Circuit has decided an important question of a local nature in a way which is in conflict with applicable local decisions. This seems to us merely a re-statement of petitioner's Reason I, except that it deals with local decisions instead of statutes, and also that it further discusses the view which this Court has taken of the applicability of State laws and decisions in other cases, which are, we think, of dissimilar types.

Both Reason I and Reason II advanced by petitioner invoke certain recent decisions of this court, particularly Guaranty Trust Company v. York, 326 U. S. 99, 89 L.

Ed. 2079, 160 A.L.R. 1231, and Angel v. Bullington, 330 U. S. 183, 91 L. Ed. 832. Both cases apply the doctrine of Erie v. Tompkins, and it appears to be upon certain observations of this Court in those cases that petitioner most strongly relies. Neither case deals with statutes, public policy or situations comparable to those found here. Significantly, in Angel v. Bullington, supra, this Court's statement was that Erie v. Tompkins "drastically *limited* the power of Federal district courts to entertain suits in diversity cases that could not be brought in the respective State courts or were barred by defenses controlling in the State courts". (Italics ours). It will be noted that the Court did not say that Erie v. Tompkins *abolished* the power of Federal district courts to entertain suits in all such diversity cases.

This court apparently did not intend by its decision in Angel v. Bullington to close the doors of the Federal district courts to every conceivable suit in a diversity case that could not be brought in the State courts. It has ruled that the doctrine of Erie v. Tompkins should be applied where suits involve questions concerning burden of proof, conflict of laws and contributory negligence. (Guaranty Trust Company v. York, supra).

We do not believe that this Court by that decision intended to add cases arising under state penal statutes to the list of those falling under the doctrine of Erie v. Tompkins; and that, it seems to us, is what it would have to do in order to decide this case favorably to the contentions of petitioner. It might be added that if the Federal courts are going to enforce one phase of the penal statutes of the State of Mississippi, there is no reason why they should not enforce other phases of the same

statutes. However, it seems to us that that is the ultimate question with which the Court may be confronted in considering the petition for certiorari in this case.

VII.

Contracts Like the One in Suit Are Not Void Nor Against Public Policy in Mississippi.

We repeat that the contract in the case at bar is not in violation of the statutes and public policy of Mississippi. If the contract had been performed and the commission paid, petitioner could not have recovered this commission in any court. No statute of Mississippi says the making or performance of a contract like this is void.

All of these statutes must be read together. They are all part of one chapter of the Mississippi Code of 1942 and they all deal with foreign corporations doing business in Mississippi. Section 5319 merely says that respondent cannot bring or maintain any suit on this contract in the State courts of Mississippi. Section 5339 provides merely for the domestication of foreign corporations and for nothing else. Section 5343 simply provides for the filing with the Secretary of State by a foreign corporation of its charter or certificate of incorporation, and provides a fine of $100 for failure to do so. Section 5344 says that a foreign corporation shall not be allowed to recover on any contract made in violation of the laws or public policy in Mississippi, but it does not say anything about the making or performance of a contract like this being in violation of the laws or public policy of the State. Of course, a foreign corporation could not make a valid Sunday contract or a valid contract to sell whiskey in Mississippi.

Furthermore, when Quartette Music Co. v. Haygood, (1914) 108 Miss. 755, 67 So. 211, said that contracts such as this were void, what is now Section 5319 had not been enacted. What is now Section 5339 is identical with Code of 1906, Section 915, which Section was in effect at the time of that decision. What is now Section 5343 is identical with Code of 1906, Section 935, which Section was also in effect at the time of that decision. What is now Section 5344 is identical with Code of 1906, Section 914, which Section was likewise in effect at the time of that decision.

So if the legislature of Mississippi had wanted the making or performance of such contracts to be void, or if it had considered the making or performance of such contracts against the laws or public policy of Mississippi, then the legislature had only to say so. Actually the legislature had only to let the decision in Quartette Music Co. v. Haygood, supra, alone, and such contracts would have been held to be void. But the legislature did not do this. In 1928, fourteen years after the decision in Quartette Music Company v. Haygood, the legislature enacted Section 5319 of the Code of 1942, which Section specifically says only that such a corporation can not bring or maintain any suit on such a contract in the courts of the state.

As this Court said in C. B. & Q. Ry. Co. v. Maguire, supra, "The legislature, provided it acts within its constitutional authority, is the arbiter of the public policy of the State. While the court, unaided by legislative declaration and applying the principles of the common law, may uphold or condemn contracts in the light of what is conceived to be public policy, its determination as a rule

for future action must yield to the legislative will when expressed in accordance with the organic law . . . "

In May v. Mulligan, 36 F. Supp. 596, affirmed 117 F. (2d) 259, cert. dem. 312 U. S. 691, 85 L. Ed. 1127, we find a good illustration of the kind of statute under which a contract is held to be void as being against public policy. There, a statute of Michigan provided that contracts not to engage in any trade, profession or business "are hereby declared to be against public policy and illegal and void." Only a brief comparison is necessary to show the vast difference between the statute there and in the case at bar.

Therefore, we submit that the assumption by counsel that the making and performance of a contract like this is against the laws and public policy of Mississippi is merely an assumption and has no basis in fact or law. The statutes of Mississippi do not make void or against public policy the making or performance of such contracts. They only make the bringing or maintaining of a suit on such contract unenforceable in the State courts. In effect, petitioner is asking the Supreme Court of the United States to do something which the legislature of Mississippi obviously did not want to do.

VIII.

Additional Cases Showing That the Supreme Court of Mississippi Does Not Consider Such Contracts Void.

As pointed out in the opinion of the Court of Appeals for the Fifth Circuit, (1948), 168 F. (2d) 701, the Supreme Court of Mississippi has itself indicated that such con-

tracts are not void, but that what is forbidden by the Mississippi statutes is only the bringing or maintenance of a suit upon such contracts in the State courts.

This is made clear by the case of *Long Beech Canning Co. v. Clark*, (1925), 141 *Miss.* 177, 106 *So.* 646. At page 186 of 141 Miss., the Supreme Court of Mississippi said:

> "The statute does not make a forfeiture of property to the state for failure to record its charter. It simply refuses the aid of its courts to those doing business in violation of the law without recording their charter."

Further, in Citizens' Bank of Hattiesburg v. Grigsby, (1934) 170 Miss. 655, 155 So. 684, the Supreme Court of Mississippi said, at page 685 of 155 Southern:

> "It is next contended that the contract was void, and that no validity can be given to the deed under the foreclosure. It will be noted, in considering this contention, that the Franklin Bond and Mortgage Co. is not a party to the suit, is seeking no relief in Court, and has sought none. The statute bearing on the matter denies to a corporation violating the statute, access to the courts for any relief. We do not think the statute voids the contract so as to affect third persons, and we are of the opinion that nobody can raise this question but the state of Mississippi when suit is brought by third persons, or when the litigation is between other persons than the corporation violating the statute and the state of Mississippi."

If a contract is void because it violates the public policy of the state, it is void for all purposes. The above case shows that the Supreme Court of Mississippi does not consider such a contract to be void.

IX.

Further Analysis of State and Federal Decisions.

The decisions of the Supreme Court of Mississippi are conflicting. Adversary counsel say "there is some confusion in the decisions of the Supreme Court of Mississippi as to whether such a contract is absolutely null and void, or merely unenforceable." (Page 11 of Brief for Petitioner). This is a mild understatement but we are pleased that counsel for petitioner have been driven to this admission. In their first brief before the Court of Appeals, they took the position that the decisions of the Supreme Court of Mississippi had held beyond doubt that such contracts were null and void. Now they admit that the decisions of the Supreme Court of Mississippi are in some confusion.

Therefore, these decisions cannot be used to show that such contracts are against the public policy of Mississippi. They can only be used to show at most, that it is against the public policy of Mississippi for such contracts to be enforced in the state courts. The Supreme Court of Mississippi, since the enactment of Section 5319 of the Mississippi Code of 1942, has never had to decide whether or not such contracts are void. Once it is shown that the foreign corporation making the contract is doing business in Mississippi and has not qualified properly under the applicable statutes, the result becomes automatic. No matter how valid or how just such a contract might be, under Section 5319 of the Mississippi Code of 1942, it can not be enforced in the courts of the State. This is all the Supreme Court of Mississippi has had to decide in such cases since 1928, and all it has decided. Anything else would have been dicta.

In Erie v. Tompkins, (1938) 304 U. S. 64, 82 L Ed. 1188, 114 A.L.R. 1487, a decision in favor of Tompkins would have permitted him to do something that a resident citizen of Pennsylvania could not have done. Permitting respondent to maintain this suit in the Federal Court will not discriminate against any resident citizen or any domestic corporation of Mississippi.

There are other reasons, too, why the decision in Angel v. Bullington, (1947), 330 U. S. 183, 91 L Ed. 832, does not apply to the case at bar. For one thing, the decision was on the ground of res judicata. For another thing, as we said in our brief in reply to the petition for rehearing in the Court of Appeals, the North Carolina statute involved in Angel v. Bullington is entirely different from the Mississippi statutes involved here. The North Carolina statute said that neither Bullington nor anybody else could recover a deficiency judgment in any court. The Mississippi statutes simply say that a non-complying foreign corporation cannot sue in the State courts. Again, if the Supreme Court of the United States had decided for Bullington, it would have discriminated in his favor against resident citizens of North Carolina. A resident citizen or a domestic corporation could not have recovered a similar deficiency judgment in the State courts. On the other hand, a contract like that in the case at bar can be enforced in the State courts by a resident citizen or a domestic corporation.

Under Brace v. Gauger-Korsmo Construction Company, (1929, C.C.A. 8th), 36 F. 2d 661, (Certiorari denied 1930), 281 U. S. 738, 50 Sup. Ct. 333, 74 L. Ed. 1153, the Court pointed out that the Arkansas decisions construing

the statute involved were in conflict, as is true here, and therefore, held that it was entitled to adopt its own construction, saying:

> "*The statute is penal in character, and hence must be strictly construed* . . . In our opinion the statute cannot be invoked, because it does not make the contract void . . . " (Italics ours.)

There is nothing in the opinion in Angel v. Bullington that says that Brace v. Gauger-Korsmo Construction Company, supra, is overruled or obsolete.

X.

Further Analysis of Other State Decisions.

The local decisions referred to by petitioner under Reason II do reflect considerable confusion. The following analysis of some of the pertinent local decisions may be of some further assistance.

Newell Contracting Co. v. State Highway Commission, (1943) 195 *Miss.* 395, 15 *So.* (2d) 700.

In this case, the Supreme Court of Mississippi, referring to a contract made by a non-qualified foreign corporation, did say that "the contract is void and unenforceable". Now a contract may be unenforceable and not be void at all. In this very case, the Supreme Court of Mississippi allowed a recovery on a contract supplemental to the main contract, because before making the supplemental contract the foreign corporation had qualified properly under the statutes. This would clearly indicate that contracts made by non-qualified foreign corporations are not considered void by the Supreme Court of Mississippi. They are merely unenforceable in the State courts. If the main contract was void, the supple-

mental contract could not have been held valid because it was based on the main contract.

Quartette Music Co. v. Haygood, (1914), 108 *Miss.* 755, 67 *So.* 211.

We first felt that the above case did not hold such contracts as the one involved here to be void. We think that we were mistaken in this and that the decision in Quartette Music Company v. Haygood supra, did hold the contract there to be void. That case was decided in 1914. In 1928, fourteen years later, the legislature of Mississippi enacted what is now Section 5319 of the Mississippi Code of 1942. That section contains as its last sentence these words: "Any foreign corporation failing to comply with the above provisions shall not be permitted to bring or maintain any action or suit in any of the courts of this state."

Now if the Legislature of Mississippi intended contracts made in Mississippi by non-qualified foreign corporations to be completely void, and thus unenforceable in any court of any sovereignty, all it had to do was to let the decision stand in Quartette Music Company v. Haygood, supra. Plainly, it did not so intend, but enacted the last sentence of Section 5319 of the Mississippi Code of 1942 specifically to show that such contracts were not void as against the public policy of Mississippi. Otherwise there was no reason for the enactment of the sentence above quoted.

Bohn v. Lowry, (1899), 77 *Miss.* 424, 27 *So.* 694.

It is true that this case holds what petitioner says it does but his quotation on page 13 of his brief stopped too soon. The paragraph of the opinion following immediately after his quotation says this:

"The illegality, whether arising by common law or from the statute, affects the act or contract with like infirmity. *An exception to this rule of law prevails where the penalty is imposed on the offending party merely for the purpose of revenue and not to prohibit the act done, nor avoid the contract.*" (Italics ours.)

Stamps v. Frost et al, (1935), 174 *Miss.* 325, 164 *So.* 584.

This case involved merely a replevin for produce seized under distress for rent under lease contract made on Sunday in violation of Mississippi Code of 1942, Section 2368. This statute absolutely prohibits work and business on Sunday.

Grapico Bottling Co. v. Ennis (1925) 140 *Miss.* 502, 106 *So.* 97.

This was a suit by the buyer of a bottled drink, bought on Sunday, on implied warranty against the bottling company. The same thing as was said above regarding Stamps v. Frost applies here.

Marx & Bensdorf v. First Joint Stock Land Bank, (1937), 178 *Miss.* 345, 173 *So.* 297.

All that is said in this case with reference to the question at issue is (page 298 of 173 So.): "It will be noted that the last clause of that paragraph provides that any foreign corporation failing to comply therewith is barred from bringing and maintaining any suits in the courts of this State." The reference is to Section 4140 of the Mississippi Code of 1930 which section is identical with what is now Section 5319 of the Mississippi Code of 1942. It is significant that the Supreme Court of Mississippi does not say that such contracts are void and does not say that the Mississippi statutes close the doors of all

courts to foreign corporations attempting to enforce such contracts.

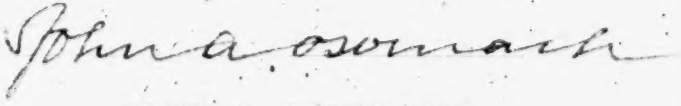
Case v. Mills Novelty Co., (1940) 187 *Miss.* 673, 193 *So.* 625.

In this case the only reference to the question here under discussion is a statement by the Supreme Court of Mississippi to this effect: " . . . and this service agreement . . . violates Section 4164, Code of 1930 (identical with what is now Section 5343 of the Mississippi Code of 1942) and is *unenforceable.*" (Italics ours). The words "void" or "voidable" are not even used.

CONCLUSION.

In conclusion, we submit that the application for certiorari should be denied.

Respectfully submitted,



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CERTIFICATE.

I certify that I have this day served notice of the filing of the above reply brief on behalf of respondent, together with copies of the brief, upon William H. Watkins, Esq., of Jackson, Mississippi, of counsel for the petitioner herein, by mailing the same to him at his office, postage prepaid, in Jackson, Mississippi.

Dated at Memphis, Tennessee, this 20th day of January, 1949.

Thomas Osmach

Of Counsel for Interstate Realty Company, Respondent